LUCY SU PIK KWONG

v.

MINISTER OF HUMAN RESOURCES & ANOR

HIGH COURT SABAH & SARAWAK, KUCHING
RAVINTHRAN PARAMAGURU JC
[JUDICIAL REVIEW NO: KCH-04-4-2011]
6 JULY 2012

ADMINISTRATIVE LAW: *Exercise of administrative powers - Judicial Review - Application to quash decision of Minister of Human Resources in refusing to refer dispute to Industrial Court - Whether Minister took into account relevant matters - Whether judicial review application within time limit - Whether proper party being sued - Specific Relief Act 1950, s. 44(1) - Rules of the High Court 1980, O. 53*

LABOUR LAW: *Employment - Applicant given show cause letter - Whether show cause letter stated that applicant liable to punishment of reduction of rank or disposal - Whether Minister took into account applicant's previous disciplinary record*

LABOUR LAW: *Industrial Court - Dismissal - Discretion of Minister in referring disputes to Industrial Court - Whether Minister took into account relevant matters - Whether Minister's decision can be interfered with by Industrial Court*

The applicant was an employee of Sarawak Electricity Supply Corporation ('SESCO') and when SESCO was corporatised, she elected to retire and accepted employment with Syarikat Sesco Berhad. The applicant had received a show cause letter bearing a Syarikat Sesco Berhad letterhead, stating that she had (i) instructed the standby contractor of her employer to reconnect electricity supply to a disconnected account; and (ii) used the cashier terminal of the Syarikat Sesco Berhad office in Sri Aman to make payment of outstanding dues to the same account. The applicant replied to the show cause letter, explaining her actions but was later met with a termination letter bearing the letterhead of Sarawak Energy Berhad ('the second respondent), signed by its Chairman of Establishment and Disciplinary Committee. When her appeal to the Chairman did not elicit a reply, the applicant made

A a representation to the Industrial Relations Department but the attempt of settlement proved futile. Further, the Minister of Human Resources ('the Minister') did not exercise his discretion to refer the dispute to the Industrial Court. In the present judicial review application, the applicant sought to quash the decision of
B the Minister in refusing to refer her representations to the Industrial Court. The applicant contended that: (i) the Minister took into account irrelevant matters while omitting relevant matters; (ii) the show cause letter she received did not state that she was liable to a punishment of reduction of rank of disposal;
C and (iii) the Minister took into account the fact that she had a previous disciplinary record. On the other hand, the respondent raised the issues of: (i) whether the applicant's judicial review application was out of time; and (ii) whether the applicant was suing the proper party.

D **Held (dismissing judicial review application with no order as to costs):**

(1) The Minister's decision can be interfered with if he had taken
E into account irrelevant considerations or had omitted to take into account relevant considerations. The fact that a domestic inquiry had been held and that the employee was found guilty of misconduct was not a ground to refuse to refer her representation to the Industrial Court. In fact, even the
F Industrial Court was not bound by the findings of a domestic inquiry. The Industrial Court was permitted by law to hear the evidence afresh and determine whether an employee was dismissed without just cause. (para 9)

(2) The applicant had no knowledge that disciplinary proceedings
G which could result in her dismissal were being taken. There was a serious procedural flaw in the domestic inquiry process and this was a very relevant consideration which the Minister had not taken into account. A similarly circumstanced Minister would have found that the representation of the applicant was
H neither frivolous nor vexatious and merited reference to the Industrial Court. (para 12)

(3) Although it was a well-established proposition of law that the previous record of the employee could be taken into
I consideration for the purpose of punishment, the applicant did not know that her previous record was being considered until

she was dismissed. Therefore, it could not be said that she was given a right to be heard. The Minister never considered this fact despite its relevancy. Hence, the Minister's decision not to refer the case to the Industrial Court could not be supported. (para 13)

(4) The contract of employment was between the applicant and Syarikat Sesco Berhad. The show cause letter issued by the disciplinary committee was on the letterhead of Syarikat Sesco Berhad. Only the termination letter was written on the letterhead of the second respondent. Apart from the fact that the termination letter was written on the letterhead of the second respondent, all the evidence including the evidence pointed to the fact that Syarikat Sesco Berhad was the employer of the applicant. There was no evidence at all in respect of the link between Syarikat Sesco Berhad and Sarawak Energy Bhd. As Syarikat Sesco Bhd was unarguably the employer of the applicant, it was not clear what role the second respondent could possibly play if re-instatement was ultimately ordered by the Industrial Court. An order of *certiorari* or *mandamus* would be of no utility to assist the applicant to seek re-instatement or compensation against the second respondent. (paras 21 & 22)

(5) Although the Minister's decision could not be supported as he omitted to take into account several relevant considerations and at the same time took into account irrelevant considerations, the judicial review application was dismissed as the application had not sought representation under s. 20 of the Industrial Relations Act 1967 against her employer or joined them as a party in this judicial review application. (para 23)

Case(s) referred to:

Dreamland Corp (M) Sdn Bhd v. Choong Chin Sooi & Industrial Court of Malaysia [1988] 1 CLJ 1; [1988] 1 CLJ (Rep) 39 SC ***(refd)***

Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan & Other Appeals [1997] 1 CLJ 665 CA ***(refd)***

Malayan Banking Bhd v. Association of Bank Officers Peninsular Malaysia & Industrial Court [1988] 1 CLJ 276; [1988] 1 CLJ (Rep) 183 SC ***(refd)***

Minister of Labour & The Government of Malaysia v. Lie Seng Fatt [1990] 1 CLJ 1103; [1990] 1 CLJ (Rep) 195 SC ***(refd)***
Shamsiah Ahmad Sham v. Public Services Commission, Malaysia & Anor [1991] 1 CLJ 23; [1991] 1 CLJ (Rep) 419 SC ***(refd)***
Wong Yuen Hock v. Syarikat Hong Leong Assurance Sdn Bhd & Another Appeal [1995] 3 CLJ 344 FC ***(refd)***

Legislation referred to:
Industrial Relations Act 1967, s. 20(1), (2), (3)
Rules of the High Court 1980, O. 53 rr. 3(6), 4(1)

For the applicant - Christopher Hii; M/s Wong, Orlando Chua & Kuok
For the 1st respondent - Mohd Taufik Mohd @ Mohd Yusoff; SFC
For the 2nd respondent - Sim Hui Chuang; M/s Reddi & Co

Reported by Najib Tamby

JUDGMENT

Ravinthran Paramaguru JC:

[1] This is a judicial review application to quash the decision of the Minister of Human Resources who refused to refer the applicant's representations to the Industrial Court. The ancillary remedy is for an order of *mandamus* to require the Minister to refer the representation of the applicant to the Industrial Court for award.

Brief Facts

[2] The applicant was a long time employee of Sarawak Electricity Supply Corporation (SESCO). She worked as an Administrative Assistant (Pembantu Tadbir). When SESCO was corporatised, she elected to retire and accepted employment with Syarikat Sesco Bhd which was the successor to SESCO. On 18 June 2007, the applicant received a show cause letter from one Ha How Ching who signed off as Chairman of Disciplinary Committee. It was written on the letterhead of Syarikat Sesco Bhd. The letter stated that she had on 22 February 2007 at 7.30pm, without authority, instructed the standby contractor of her employer to reconnect electricity supply to a disconnected account. The second charge was that whilst on leave on 23 February 2007, she had used the cashier terminal of the

Syarikat Sesco Bhd's office in Sri Aman to make payment of outstanding dues to the same account. In the said show cause letter, Ha How Ching asked for an explanation within days why disciplinary action should not be taken against her. The applicant replied to the show cause letter on 13 July 2007. Her explanation in summary is as follows. She said that the disconnected account belonged to government quarters owned by the Sarawak Government and it was occupied by the Divisional Head of the Public Works Department (JKR). She said that she may have been "overzealous" in passing the request from the Divisional Engineer of JKR to the standby contractor through the Senior Technical Assistant. She apologised for overstepping her authority. As for the second charge, she said that she was requested by the Sri Aman JKR to check the account as, in their opinion; the account should not have been disconnected. She had approached the cashier in charge, one Frankie Christopher for assistance but since he was busy, he gave her his approval to check the outstanding bills. On 12 July 2007, the Divisional Engineer of JKR Sri Aman Division (Ang Ek Koon) also wrote to the general manager of Syarikat Sesco Bhd to intercede for the applicant. He said that he sought the assistance of the applicant on the day in question for assistance to reconnect electrical supply to the said government quarters because of security problems.

[3] The above explanation did not commend itself to her employer. On 26 October 2007, the applicant received a termination letter. The letter was drafted on the letterhead of Sarawak Energy Bhd. It was signed by one Tan Sri Datuk Amar Hj Abdul Aziz bin Dato Hj Husain. He signed as Chairman, Establishment and Disciplinary Committee. The applicant's appeal to the Chairman did not elicit a reply. She then made a representation to the Industrial Relations Department on 26 November 2007. The settlement efforts failed and the Director General of Industrial Relations notified the Minister under s. 20(2) of the Industrial Relations Act 1967. Under s. 20(3), the Minister if he thinks fit, may refer the representations to the Industrial Court for an award. Unfortunately for the applicant, the Minister did not exercise his discretion to refer the dispute to the Industrial Court and accordingly notified her on 15 July 2011.

[4] Under O. 53 r. 3(4) of Rules of the High Court 1980 an application for judicial review shall be made within 40 days from the date when the grounds for the application first arose or when the decision is first communicated to the applicant. On the 39th day after the decision of the Minister was communicated to the applicant, she applied for leave. The leave application was granted without any objection from the Federal Attorney General Chambers.

Issues

[5] The applicant has joined both the Minister and Sarawak Energy Bhd as respondents. The argument of the applicant is that the Minister took into account irrelevant matters such merits of the dispute in making his decision, ie, the domestic inquiry, and the past record of the applicant. On the other hand, the applicant contended that the Minister did not take into account matters that he ought to have such as the defective show cause letter, the failure to inform the applicant of the domestic inquiry hearing date, failure to consider the letter from the Divisional Engineer of JKR, incomplete investigation and breach of natural justice. Before I proceed to consider some of the issues, I shall first address the power of court to interfere with the decision of the Minister under s. 20(3) of the Industrial Relations Act 1967.

Power Of Court To Review

[6] Counsels for the two respondents have not taken the position that the power of the Minister is absolute nor that his discretion is unfettered under s. 20(3). In *Minister of Labour & The Government of Malaysia v. Lie Seng Fatt* [1990] 1 CLJ 1103; [1990] 1 CLJ (Rep) 195; [1990] 2 MLJ 9, Hashim Yeop Sani CJ at the Supreme Court had the occasion to consider this discretion. That court held that:

> The minister's discretion under s. 20(3) is wide but not unlimited. As stated earlier, so long as he exercises the discretion without improper motive, the exercise of discretion must not be interfered with by the court unless he had misdirected himself in law or had taken into account irrelevant matters or had not taken into consideration relevant matters or that his decision militates against the object of the statute. Otherwise he had a complete discretion to refuse to refer a complaint which is clearly frivolous or vexatious which in our view this is one.

[7] In *Malayan Banking Bhd v. Association of Bank Officers Peninsular Malaysia & Industrial Court* [1988] 1 CLJ 276; [1988] 1 CLJ (Rep) 183; [1988] 3 MLJ 204, Abdoolcader SCJ also considered the discretion of the Minister in the following passage:

> The court can only interfere on the ground that the Minister has gone outside the powers of the Act or that any requirement of the Act has not been complied with. Under this section it seems to me that the court can interfere with the Minister's decision if he has acted on no evidence; or if he has come to a conclusion to which on the evidence he could not reasonably come; or if he has given a wrong interpretation to the words of the statute; or if he has taken into consideration matters which he ought not to have taken into account, or *vice versa*; or has otherwise gone wrong in law. It is identical with the position when the court has power to interfere with the decision of a lower tribunal which has erred in point of law.

[8] In *Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan & Other Appeals* [1997] 1 CLJ 665, Gopal Sri Ram JCA at the Court of Appeal said as follows in respect of the circumstances that permits interference with the decision of the Minister:

> I pause to emphasize that the Minister's decision, one way or the other, upon the question whether representations made under s 20(1) are frivolous or vexatious, is neither final nor conclusive, and may be reopened in judicial review proceedings. A court may, upon an objective assessment of the facts and material that was placed before the Minister, fairly come to the conclusion that the representation is, or is not frivolous or vexatious and hence merits reference to the Industrial Court for an award.

[9] From the above passages, it is clear that the Minister's decision can be interfered with if he has taken into account irrelevant considerations or has omitted take into account relevant considerations. In the first affidavit in reply, the Minister deposed that he considered the fact that the dismissal was preceded by a domestic inquiry. The fact that a domestic inquiry had been held and that the employee was found guilty of misconduct is not a ground to refuse to refer her representation to the Industrial Court. In fact, even the Industrial Court is not bound by the findings of a domestic inquiry. The Industrial Court is permitted by law to hear the evidence afresh and determine whether an

employee is dismissed without just cause (*Wong Yuen Hock v. Syarikat Hong Leong Assurance Sdn Bhd & Another Appeal* [1995] 3 CLJ 344; *Dreamland Corp (M) Sdn Bhd v. Choong Chin Sooi & Industrial Court of Malaysia* [1988] 1 CLJ 1; [1988] 1 CLJ (Rep) 39). However, I note that the Minister did not reject referral to the Industrial Court on the sole ground that a domestic inquiry was held by the employer.

[10] Counsel for applicant also submitted that the Minister failed to take into account several relevant considerations. The foremost of these relevant considerations is as follows. The applicant received a show cause letter which did not state that she is liable to a punishment of reduction of rank or dismissal. Under the Terms and Conditions of Service (Scheme B), an employee is liable to two types of disciplinary proceedings. Rule 29(1) of the Terms and Conditions of Service provides as follows:

> Where the Chairman of the Disciplinary Committee finds that the breach of discipline complained of is of a nature which merits a punishment lesser than dismissal or reduction in rank, the Disciplinary Committee shall inform the employee in writing of the facts of the breach of discipline alleged against him and shall give to the employee an opportunity of making a representation in writing within a period of not less than twenty-one days from the date of receipt of the facts.

[11] Rule 30(1) on the other hand provides the procedure for breaches of discipline that results in reduction of rank or dismissal. It reads as follows:

> Where the Chairman of the Disciplinary Committee finds that the breach of discipline complained of is of a nature which merits a punishment of dismissal or reduction in rank, the Disciplinary Committee shall consider all the available information and, where it appears that there is a *prima facie* case against the employee for dismissal or reduction in rank, shall direct that a statement containing the facts of the breach of discipline alleged to have been committed and any proposed ground on which the employee is to be dismissed or reduced in rank be sent to him and shall call upon him to make a written representation, containing grounds upon which he relies to exculpate himself, within a period of not less than twenty-one days from the date of receipt of the charge.

[12] Rule 30(1) states that the statement sent to the employee should contain "any proposed ground on which the employee is to be dismissed or reduced in rank". In my view, this simply means that the employee should be informed that action is being taken with a view to reduce her rank or dismiss her on "proposed grounds". Otherwise, the disciplinary proceedings cannot fall under rule 30(1). In the instant case, counsel for applicant is correct to submit that the show cause letter in question fell under rule 29 which did not provide for the punishment of reduction of rank or dismissal. As stated in the summary of facts, the applicant had no knowledge that disciplinary proceedings which could result in her dismissal were being taken. She had merely received a letter asking for an explanation why she had reconnected electrical supply to a disconnected account without authorisation and why she had made payments to the same account. It is true that the letter stated that disciplinary proceedings would be taken against the applicant but since there is no mention of reduction in rank or dismissal, there would have been no reason for her to assume that she could lose her job. As rule 30(1) specifically provides that an employee should be informed of the proposed grounds on which reduction in rank or dismissal could ensue, in my view, there is a serious procedural flaw in the domestic inquiry process. The applicant could have sought legal advice or deliberated more carefully about her "explanation" to the disciplinary committee. This is certainly a very relevant consideration which the Minister had not taken into account. If he had done so, the decision may well have been different. On this ground alone, I am minded to rule that a similarly circumstanced Minister would have found that the representation of the applicant was neither frivolous nor vexatious and merited reference to the Industrial Court.

[13] Next, counsel for applicant submitted that the Minister took into account the fact that the applicant had a previous disciplinary record. The previous disciplinary record was stated as a ground for termination. It is well established proposition of law that for purpose of punishment, the previous record of the employee can be taken into consideration. However, the fact that the previous record of the applicant was being considered was not made known to the applicant until she was dismissed. Therefore it cannot be

said that she was given a right to be heard (see *Shamsiah Ahmad Sham v. Public Services Commission, Malaysia & Anor* [1991] 1 CLJ 23; [1991] 1 CLJ (Rep) 419). The Minister never considered this fact though it is relevant. On this ground as well, the Minister's decision not to refer the case to the Industrial Court cannot be supported.

Other Grounds

[14] Learned counsel for applicant also submitted a number of other grounds. He submitted that a Committee of Investigation had been appointed in this case under rule 30(4) and rule 30(6)(a) which read as follows:

> Rule 30(4) and 30(6)(a) of the Terms and Conditions of Service (Scheme B) stipulates:
>
> (4) Where the Disciplinary Committee is of the opinion that the case against the employee requires further clarification, it may appoint a Committee of Investigation comprising not less than two officers of the Company who are senior to the employee under investigation.
>
> ...
>
> (6) The Committee of Investigation appointed under sub-rule (4):
>
> (a) shall inform the employee of the date when the question of his dismissal or reduction in rank will be brought before the Committee of Investigation and, if the Committee of Investigation is of the view that the employee be allowed to appear, that he shall present himself before the Committee to exculpate himself ...

[15] Counsel for applicant submitted that the inquiry date was never furnished to the applicant. The basis for this submission is that the Minister in his affidavit in reply referred to an investigation comprising two officers of the second respondent. Counsels for respondents submitted that a Committee of Investigation was never appointed in this case and that it is the discretion of the disciplinary committee to do so. In my opinion, there is no merit in this point. It is clear from rule 30(4) that a Committee of Investigation need not be appointed in every case. The Minister in his affidavit in reply only referred to investigating officers. Therefore, there is absolutely no reason to assume that a Committee of Investigation had been appointed. I, therefore, find no merit in this point.

[16] Counsel for applicant submitted that the letter from the Divisional Engineer of JKR, Sri Aman, (Ang Ek Koon) was not considered by the Minister. The Minister had not considered the said letter on the ground that it was not tendered during the conciliation proceedings. Counsel for applicant submitted that it was tendered. Be that as it may, in my view, the failure to consider the said letter is not a significant oversight as the letter only constituted a plea to mitigate the alleged offence of the applicant.

[17] Counsel for applicant then submitted that the investigation of the second respondent was not complete as the Senior Technical Assistant through whom the request to reconnect electrical supply was passed to the standby contractor was not interviewed by the investigation team of the second respondent. This argument lacks merit as it is not the function of the Minister to evaluate the completeness of the investigation. His duty is merely to act as a filter to determine if the representation is frivolous or vexatious and in doing so he is to take into account relevant considerations and ignore irrelevant considerations. The fact that the Senior Technical Assistant was not called is not necessarily a relevant consideration.

Arguments Of The Second Respondent

Whether Judicial Review Application Out Of Time?

[18] Two significant issues were raised by counsel for second respondent. The first issue is whether it is sufficient for an applicant to file an application for leave within 40 days from the date when the grounds for the application first arose or when the decision is first communicated to the applicant. Counsel for second respondent submitted that it is not sufficient. He argued that the application for judicial review as opposed to the leave application, should be filed within 40 days from the date when the grounds for the application first arose or when the decision is first communicated to the applicant. Order 53 r. 3(6) of Rules of the High Court 1980 reads as follows:

> (6) An application for judicial review shall be made promptly and in any event within 40 days from the date when grounds for the application first arose or when the decision is first communicated

A to the applicant provided that the Court may, upon application and if it considers that there is a good reason for doing so, extend the period of 40 days.

[19] In my opinion, the submission of counsel for second respondent is without merit. Although the words "judicial review" is employed in the above sub-rule, the only logical construction that can be given to sub-r. 6 is that it refers to a leave application to commence judicial review as opposed to the judicial review application itself. This is because the marginal note to r. 3 reads "Leave". Only r. 4 refers to the judicial review application proper. Rule 4 of Rules of the High Court 1980 reads as follows:

Rule 4. Notice. (O. 53, r. 4).

(1) Where leave has been granted under this rule, the applicant shall, within 14 days after the grant of such leave, file a notice in Form 111B.

[20] Thus, O. 53 r. 4(1) stipulates that the judicial review application must be made within 14 days of grant of leave which is dealt with in the preceding rule. In the premises, the reference to judicial application in r. 3 must necessarily refer to a leave application. In any event, a leave application is also part of the judicial review application as O. 53 prescribes a two stage process. The third reason would be that in the event the court does not deliver its decision on a leave application expeditiously, the applicant would be out of time through no fault of his own. In the instant case, the judicial review application in Form 111B was filed within 14 days as prescribed by O. 53 r. 4. Therefore, the delay point is without merit.

Whether Proper Party Sued?

[21] The applicant has joined Sarawak Energy Bhd as the second respondent in this judicial review application. The applicant had also made representations against Sarawak Energy Bhd at the Industrial Relations Department upon receiving the termination letter. Counsel for second respondent submitted that the applicant has deposed in her affidavit in support that her employer was Syarikat Sesco Bhd. However, she has made representations to

the Minister against the second respondent. This submission of counsel for second respondent is not without basis. In para. 2 of the affidavit in support, the applicant had deposed as follows:

> I am at all material times a Pembantu Tadbir of the 2nd Respondent Syarikat SESCO Berhad (Co. No. 672931-A). Prior to this I had served with the predecessor to the said Syarikat SESCO Berhad, Sarawak Electricity Supply Corporation since 3rd January 1983. On or about July 2005, the said Sarawak Electricity Supply Corporation was privatized and taken over by the said Syarikat SESCO Berhad. Upon the said privatization I had taken up the offer by to serve the said Syarikat SESCO Berhad under the Terms and Conditions of Service (Scheme B) (hereinafter referred to as "the said Scheme B"). A copy of my acceptance of offer for service is exhibited herewith and marked "LSPK1".

[22] The contract of employment exhibited as LSPK1 is between the applicant and Syarikat Sesco Bhd. The show cause letter issued by the disciplinary committee was on the letterhead of Syarikat Sesco Bhd. Only the termination letter was written on the letterhead of Sarawak Energy Bhd. However, Tan Sri Datuk Amar Hj Abdul Aziz bin Dato Hj Husain, the author of the letter, did not sign as an office holder of Sarawak Energy Bhd. He only signed as Chairman, Establishment and Disciplinary Committee. Counsel for second respondent submitted that the applicant has made representation under s. 20 of the Industrial Relations Act 1967 against the wrong party. Section 20(1) refers to "employer" and "former employment". In my opinion the submission of counsel for second respondent has merit. Apart from the fact that the termination letter was written on the letterhead of second respondent, all the evidence including the evidence disclosed in the affidavit in support of the applicant, points to the fact that Syarikat Sesco Bhd is the employer of the applicant. There is no evidence at all in respect of the link between Syarikat Sesco Bhd and Sarawak Energy Bhd. The remedy sought under s. 20 of the Industrial Relations Act 1967 is primarily for reinstatement to former employment. In fact, unless reinstatement is sought, the Minister would have no jurisdiction to refer the case to the Industrial Court. In the instant case, as Syarikat Sesco Bhd is unarguably the employer of the applicant, it is not clear what role the second respondent could possibly play if reinstatement is

ultimately ordered by the Industrial Court. In the premises, an order of *certiorari* or *mandamus* as prayed in this judicial review application will be of no utility to assist the applicant to seek reinstatement or compensation against the second respondent.

[23] In conclusion, although I am of the view that the Minister's decision cannot be supported as he omitted to take into account several relevant considerations and at the same time took into account irrelevant considerations, the judicial review application is dismissed as the applicant has not sought representation under s. 20 of the Industrial Relations Act 1967 against her employer, Syarikat Sesco Bhd, or joined them as a party in this judicial review application. No order as to costs.